UG Hotel Property Sdn Bhd v Chee Soo Lam & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02–1296 OF 2005
LOW HOP BING, ALIZATUL KHAIR AND ANANTHAM KASINATHER JJCA
8 AUGUST 2012

Landlord and Tenant — Tenancy — Agreement — Termination of — Alteration or addition in or on health spa — Respondents used hot shower outlet to convey water to jacuzzi — Alteration without written consent of landlord — Whether respondents breached agreement — Whether eviction and termination of agreement lawful — Whether trial judge correct in relation to unauthorised use of hot shower outlet by respondents — Whether trial court failed to sufficiently appreciate evidence adduced — Whether warranting appellate intervention

Tort — Defamation — Vicarious liability — Respondents accused of stealing water from appellant — Accusation reduced into writing through police report lodged — Alleged defamation statement made by respondent's employee — Whether principle of vicarious liability applicable to facts of this case — Whether High Court judge erred in holding appellant liable for defamation

The appellant had appealed against the decision of the High Court which had allowed the respondent's claim. In this case, vide an agreement dated 1 March 1997, ('the said agreement') the appellant had agreed to rent a premise ('the said premises') in the said hotel to the respondents for the latter to operate a health spa. Under the said agreement, the tenancy period was for a duration of three years effective from 1 March 1997. Subsequently, the parties entered into a supplemental agreement ('the supplemental agreement') which allowed, inter alia, the reduction of rental and the revision of the monthly rental of the said health spa. As the respondents were alleged to have unlawfully tampered with one of the shower outlets in the bathroom by connecting pipes from the hot shower to fill the jacuzzi, the appellant had, on 25 May 1999, terminated the said agreement pursuant to cl 6(c). The respondents then filed the present suit in the High Court claiming wrongful eviction and termination of the said agreement. At the conclusion of the trial, the High Court held in favour of the respondents. The respondents had in the suit above also sued the appellant for defamation arising out of the words uttered by one Michelle Teh Siau Eng, an employee of the appellant, who had accused the respondents of stealing water from the appellant. The accusation was subsequently reduced into writing through a police report lodged by the said Michelle. The learned judge found the appellant liable for defamation and ordered that damages as claimed be

assessed by the registrar. The basic issue raised in this appeal was whether the learned judge was correct in relation to the unauthorised use of the hot shower outlet by the respondents.

Held, allowing the appeal with costs:

(1) The respondents were in breach of the said agreement in that they had used the hot shower outlet to convey water to the jacuzzi. This constituted an alteration to the said premises and was done without the consent of the appellant. This was clear from cl 3(h) of the said agreement which expressly enjoins the respondents (tenant) from making any alterations or additions in or on the said health spa without obtaining the written consent of the appellant (landlord). The conduct of the respondents as such gave to the appellant the right to terminate the said agreement pursuant to cl 6(c) of the same. Consequently, the eviction and termination of the said agreement by the appellant was lawful (see para 20).

(2) In relation to the issue of defamation, the principle of vicarious liability had no application to the facts of this case. Under the law of defamation, only the person who published (the alleged defamatory statement) can be held liable. The High Court judge erred in holding the appellant liable for defamation (see para 21).

[Bahasa Malaysia summary

Perayu telah membuat rayuan terhadap keputusan Mahkamah Tinggi yang mana telah membenarkan tuntutan responden. Dalam kes ini, melalui perjanjian bertarikh 1 Mac 1997 ('perjanjian tersebut') perayu telah bersetuju untuk menyewa satu premis ('premis-premis tersebut') di dalam hotel tersebut kepada responden-responden untuk responden-responden menjalankan perniagaan spa kesihatan. Di dalam perjanjian tersebut, tempoh penyewaan adalah untuk tiga tahun bermula dari 1 Mac 1997. Selanjutnya, pihak-pihak telah memeterai perjanjian tambahan ('perjanjian tambahan') yang mana membenarkan, antara lain, pengurangan harga sewa dan pindaan bagi sewa bulanan untuk spa kesihatan tersebut. Apabila responden didakwa telah mengusik salah satu bilik mandi di dalam tandas dengan menyambungkan paip-paip dari pancuran air panas untuk mengisi jakuzi, perayu telah pada 25 Mei 1999, telah menamatkan perjanjian tersebut mengikut klausa 6(c). Responden-responden kemudian telah memfailkan guaman ini di Mahkamah Tinggi mendakwa pengusiran secara salah dan penamatan perjanjian tersebut. Pada akhir perbicaraan, Mahkamah Tinggi memutuskan bagi pihak responden-responden. Responden-responden telah dalam guaman tersebut juga menyaman perayu untuk fitnah yang timbul daripada kata-kata yang dikatakan oleh Michelle Teh Siau Eng, pekerja perayu, yang telah menuduh responden-responden mencuri air daripada perayu. Tuduhan tersebut kemudiannya telah dijadikan dalam bentuk tulisan melalui laporan polis yang

dibuat oleh Michelle. Hakim yang bijaksana telah mendapati perayu bersalah untuk fitnah dan memerintah bahawa ganti rugi seperti yang dituntut ditaksirkan oleh pendaftar. Isu dasar yang dibangkitkan oleh perayu adalah sama ada hakim yang bijaksana adalah betul berkenaan dengan penggunaan bilik mandian panas yang tidak dibenarkan oleh responden-responden.

Diputuskan, membenarkan rayuan dengan kos:

(1) Responden-responden telah melanggar perjanjian tersebut dengan menggunakan bilik mandian panas untuk menyalurkan air ke jakuzi. Ini membawa kepada penukaran terhadap premis-premis dan telah dilakukan tanpa kebenaran perayu. Adalah jelas daripada klausa 3(h) perjanjian yang mana dengan jelas menghalang responden-responden (penyewa) daripada membuat sebarang pengubahan atau tambahan di dalam atau pada spa kesihatan tanpa mendapatkan kebenaran bertulis perayu (tuan tanah). Kelakuan responden-responden memberikan hak untuk pembatalan perjanjian tersebut mengikut klausa 6(c). Selanjutnya, penyingkiran dan pembatalan perjanjian tersebut oleh perayu adalah sah (lihat perenggan 20).

(2) Berkenaan dengan isu fitnah, prinsip liabiliti vikarius tidak diguna pakai bagi fakta-fakta kes ini. Dalam undang-undang fitnah, hanya orang yang menerbitkan (kenyataan fitnah yang didakwa) boleh didapati bersalah. Hakim Mahkamah Tinggi telah terkhilaf dengan mendapati perayu bersalah untuk fitnah (lihat perenggan 21).]

Notes

For a case on agreement, see 9(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1248.

Cases referred to

Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Appeal from: Civil Suit No 22–120 of 1999 (High Court, Alor Setar)

Shafee Abdullah (Azad Bashir bin Abdul Kariem Bashir with him) (Shafee & Co) for the appellant.
Simon Murali (Lio & Partners) for the respondent.

Alizatul Khair JCA (delivering judgment of the court):

[1] The appellant ('the defendant before the High Court') herein had appealed against the decision of the learned High Court judge, Alor Setar who had allowed the respondent's ('the plaintiff below') claim after full trial.

[2] The brief background facts are as follows: A

[3] The respondents were partners of a business enterprise operating under the style and name of Perniagaan Spanova. The appellant was the owner of Novotel Hotel ('the hotel') which is situated in Sungei Petani, Kedah Darul Aman. Vide agreement dated 1 March 1997, ('the said agreement') the appellant had agreed to rent a premise ('the said premises') in the said hotel to the respondents for the latter to operate a health spa. B

[4] Under the said agreement, the tenancy period was to commence from 1 March 1997 and was for a duration of three years. The parties subsequently entered into a supplemental agreement ('the supplemental agreement') in which the following terms were agreed upon: C

(a) that the rental be reduced from RM16,500 to RM14,025 as requested by the respondents; and D

(b) the appellant be allowed to revise the monthly rental of the said health spa.

This supplemental agreement was effective from 1 June 1998.

E

[5] On 19 May 1999, whilst conducting an inspection on the said premise, the respondents discovered that there was corrosion (on the said premises) which required immediate remedial measures to avoid any structural damage to the building.

F

[6] Thus, the respondents informed the appellant vide letter of 20 May 1999 that due to the proposed remedial works, the said health spa have to be closed, the supplemental agreement suspended and the rental ceased to be payable until the health spa was rendered fit for use.

G

[7] On or about 24 May 1999, the appellant was informed by its maintenance manager that the respondents had unlawfully tampered with one of the shower outlets in the bathroom by connecting pipes from the hot shower to fill the jacuzzi. The appellant then re-entered and took possession of the said premises. The appellant contended that, by connecting pipes from the hot shower outlet to fill up the jacuzzi, the respondents had breached the said agreement. Consequently, a letter was issued the following day on 25 May 1999 by the appellant terminating the said agreement pursuant to cl 6(c) of the same. The relevant paragraphs of the said letter read as follows: H

I

> Our officers called at the Health Spa yesterday to arrange for an inspection of the premises prior to starting the renovation works mentioned in our letter of May 20, 1999. At the premises, our officers noticed that *you have without our consent and authority tampered with one of the Shower outlets, by connecting pipes from the same to*

the Jacuzzi. It was apparent that you have been filling up the Jacuzzi using heater water drawn from the shower and not, as should be the case from the Jacuzzi's boiler.

By not using the Jacuzzi's boiler you saved on your electricity charges but by the same token, you had at our expense used water from an unauthorized source for which you need only to pay a flat charge of RM350 per month, irrespective of the quantity used and whether heated or otherwise. We believe your action is avariciously motivated and constitute theft.

Your unauthorized tampering of the fittings at the Health Spa also show a wanton disregard for the safety of the building. We are in the hospitality business and such an act is unacceptable to us.

For the aforesaid reasons, we have pursuant to Clause 6(c) retaken possession of the Health Spa and the said Tenancy Agreement is hereby terminated. (Emphasis added.)

[8] The respondents then filed the present suit in the High Court at Alor Setar claiming wrongful eviction and termination of the said agreement.

[9] At the trial both parties agreed that the court will only determine the issue of liability with damages to be assessed by the registrar in the event the court were to find in favour of the respondents.

[10] As it turned out, the High Court did find for the respondents at the conclusion of the trial and it proceeded to enter judgment for the respondents with costs as prayed for in the statement of claim in the following terms:

(i) Gantirugi khas sebanyak RM541,504.00;

(ii) Gantirugi am, termasuk gantirugi tindakan untuk pengingkaran perjanjian;

(iii) Gantirugi am, termasuk gantirugi teladan untuk pemfitnahan.

The learned judge ordered the abovesaid damages to be assessed by the registrar.

[11] The respondents had in the suit above also sued the appellant for defamation arising out of the words uttered by one Michelle Teh Siau Eng; an employee of the appellant, who had on the day the appellant entered the said premises (ie on 24 May 1999), accused the respondents of stealing water from the appellant. The accusation was subsequently reduced into writing through a police report lodged by the said Michelle during the later part of the day.

[12] The learned judge found the appellant liable for defamation and ordered that damages as claimed in para (iii) be assessed by the registrar and paid to the respondents.

[13] The above narration of the background facts of this appeal were, in the main, undisputed. The basic issue raised in this appeal was whether the learned judge was correct in holding, as regards the unauthorised use of the hot shower outlet by the respondents, as follows:

> Mengenai isu salah guna air 'shower' oleh plaintif-plaintif, pihak plaintif-plaintif menghujah bahawa penggunaan air tersebut tidak dikawal selia oleh mana-mana peruntukan dalam perjanjian tersebut. Defendan pula menghujah bahawa air 'shower' sepatutnya digunakan untuk tujuan biasa iaitu untuk mandi dan bukan untuk memanaskan 'jacuzzi'. Berkenaan isu ini saya setuju dengan penghujahan plaintif-plaintif bahawa perjanjian tersebut tidak memperuntukkan mengenai klausa air 'shower' dalam premis plaintif-plaintif.

[14] The learned judge also opined that the respondents was entitled under cl 4(h) of the said agreement to quiet enjoyment of the said premise. This is what he said:

> … apa-apa kemudahan yang berada dalam premis plaintif-plaintif termasuk 'shower' merupakan kemudahan-kemudahan yang mana plaintif-plaintif mengikut perjanjian berkenaan patut menikmati secara aman sentosa tanpa apa-apa gangguan oleh defendan.

[15] It is trite, of course, that an appellate court will not, generally speaking, interfere with the decision of a trial court unless the court is shown to be plainly wrong in arriving at its conclusion or where there has been no or insufficient judicial appreciation of the evidence, (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC).

[16] In the present case, learned counsel for the appellant submitted that the learned judge in arriving at his finding had failed to sufficiently appreciate the evidence adduced before him, thus warranting appellate intervention.

[17] As observed by learned counsel, the respondents never denied the fact that they had altered and connected the pipes from the hot shower outlet to fill the jacuzzi. The respondent's argument was (and which argument was accepted by the learned judge as seen from the excerpt of his judgment) that the said agreement failed to expressly stipulate the purpose of the hot shower outlet in the bathroom and hence they were not prohibited from using the hot shower outlet to fill up the jacuzzi.

[18] The appellant's submission was that whilst the said agreement may not have expressly prohibited the respondents from using the hot shower outlet to fill up the jacuzzi, the court ought to look at the implied terms of the said agreement in order to ascertain the real intention of parties when they entered into the said agreement. It was only through such a construction that justice

will be achieved. Learned counsel for the appellant then urged the court to apply the 'Official Bystander's Test' and the 'Business Efficacy Test' to imply such a term in the said agreement.

[19] Learned counsel for the respondents on the other hand pointed out to the court that the issue of implied term was not expressly pleaded in the appellant's statement of defence nor was it raised in the course of proceedings or during final submission before the High Court. As such counsel was of the view that appellant's submission on this issue ought not fo be entertained.

[20] We have considered both parties' arguments and in our view based on the undisputed facts before the court, the respondents were in breach of the said agreement in that they had used the hot shower outlet to convey water to the jacuzzi. This constituted an alteration to the said premises and was done without the consent of the appellant. This was clear from cl 3(h) of the said agreement which expressly enjoins the respondents (tenant) from making any alterations or additions in or on the said health spa without obtaining the written consent of the appellant (landlord). We therefore hold that the conduct of the respondents as such gave to the appellant the right to terminate the said agreement pursuant to cl 6(c) of the same. Consequently, the eviction and termination of the said agreement by the appellant was lawful. In view of our finding above, we did not feel it necessary to consider the issue of implied term raised by the appellant's counsel.

[21] In relation to the issue of defamation, it is clear the learned judge had attributed vicarious liability for the alleged defamation statement made by the respondent's employee (the said Michelle). In our view, the principle of vicarious liability has no application to the facts of this case. Under the law of defamation, only the person who published (the alleged defamatory statement) can be held liable. We therefore found the High Court judge erred in holding the appellant liable for defamation. We therefore allowed the appeal on the above two grounds and set aside the High Court judge's decision and award costs of RM30,000 here and in the court below to the appellant.

[22] We had also, upon learned counsel informing us that the appellant was not pursuing their counterclaim, ordered that the counterclaim be struck out and the deposit be refunded to the appellant.

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed